MEMORIAL

Againſt an OVERTURE of an ACT for Statuting,

at no REGALITY nor JUSTICIARY be-north Tay, *Erected, or to be Erected, ſhall be Privative of the Juriſdiction of SHERIFFS, or other Judges ordinary in Criminals,* &c.

THE Propoſal is moſt *Pernicious* in its *Conſequences*; both in reſpect of the *Matter* of it, and the *Manner* of bringing it in.

This Laſt, may have the Firſt Conſideration.

It's not an Act offered by a *diſintereſted* Perſon, for a *publick Good:* But it's nottourly propogat a *private* Intereſt, under *that Colour*; which is a fearful Abuſe. For, if ſuch Meaſures be ountenanced, hereafter the worſt *Deſign* may be covered with the beſt *Name*, when there is a oject to *impoſe* in the Matter.

It's not an Act *Explanatory* of what is Dubious, before it come to depend in *Judgement*. But hile a Proceſs is actually *pendent* before this High Court and the Seſſion, at the inſtance of One; d Others are *waiting* to bring in theirs: They find that Laws already made will not ſuffer em to oppreſs their Neighbours in their Freeholds, and therefore they take the Confidence to elent a *Statutory Act* that againſt clear Law may Pre-determine all Actions preſent and future.

It's not an Act that pretends, it would be *Juſt on this ſide of* Tay. But how Juſtice, in *privat ghts*, can have reſpect of *Perſons*: Or how ſo ſmall a diſtance of place can totally alter the ature of *Righteouſneſs*; is what is too choaking to advance. However, though Injuſtice be ctually leſs, the leſs *Havock* it make: Yet this Act is only a Fore-runner, being plainly alculat to be an *Example and Practique* for another over the reſt of the Nation, eſpecially where ere may be a *Shew* either of Borders or Highlands to ſupport it.

Now it is certain, That if *Ambuſhes* might be thus laid for conquering *Inheritances* eſtabliſhed by aw, Conſent, Perſcription, Owned hitherto in all the Judicatures of the Nation; left by Antc:ſtors a ſure Property to Poſterity: And wherein alſo, His Majeſty's Prerogative is peculiarly con-rned: And all this without Citing or Hearing of Parties: How farr may ſuch a precedent extend? nd what may be the dreadful Sequels of it?

By ſuch a *fraudulent Anticipation*; the diſtinction of the Judicative and Legiſlative power ould evaniſh. Acts *ſalvo jure* would be of no uſe. Our *Infeftments* would come to *Fall*, not by ecreets (in which the Property of the Liedges may be protected, by allowing them the Natural ight of ſelf Defence) but by Acts of Parliament *parte in audita.* The ſeveral Laws ordaining, at Acts *of Parliament* look only foreward, and bind 40 days after their Publication, ſhall be of o Moment. And finally, *Publick Laws* will utterly come in *Diſrepute*, as eſtabliſhing *Unrigh-uſneſs*, having been made in *particular Views*: Whereas Laws ought to be *Commune preceptum*, *partial*, and protecting *all alike*.

In a word, the contrary would prove a Scandal, Scorn, and Snare; whereof the Events to Po-erity cannot be eaſily enumerat.

This leads to the *Matter* of the Overture, which indeed needed ſuch an extraordinary conduct.

For clearing hereof: It is to be conſidered, that a Regality is only an exalted *Barrony*. It is a *ative* Jurisdiction over a Territory belonging to the Judge himſelf in Property or Superiority. Whence by immemorial *Cuſtom* our Kings have granted Regalitys without Quarrel: and 72. *Act* arl. 14. *Ja:* 2. entituled, *That the freedom of Regals be keeped* &c. expreſly ſtatuts, *That all riviledges & Freedoms of Regalitys be keeped as they are found.* Yea, by a poſitive Deciſion of the Lords in *Hope*, They found, *That a new erected Regality, hath a privative Jurisdiction thin an old heretable Sheriffſhip:* And all our *Lawers* who have wrot, are of the ſame mind

If it were otherways, it could be only upon this ground, *Viz.* That *no Erection* can be made in *ejudice of a former*: In which caſe, here is a great ſtroak given both to the *Kings prerogative*, and e *whole three Eſtates* of Parliament.

This Branch would be lopped from the Crown, though it has been preſerved in vigour by con-nual *Uſe* againſt all Preſcriptions.

The Nobility would loſe at a daſh, the *Rewards* of their Predeceſſors Merits.

The Barrons and Burrows would be *thraled* to an Heretable Sheriff (whoſe *Fie* is *Interpoſed* twixt his Majeſty and them) ſo as they could never be in *capacity to get out*. Whereas they holding of the King, can never come within a Regality.

But

But further; There is a far more dangerous consequence to the Burrous in particular; which tho (it is hoped) will never fall out in good Reigns, yet follows from the principle, that a Sheriffs Right cannot be diminished.

Its well known, what was done in *England* by *Quo warranto's*, and in *Scotland by Letters*, imposing Magistrates and Clerks.

It may be also remembred, what was one of the Grounds, *Viz.* That tho Burrows might be erected within Heretable Sheriffships, *quoad Trade*; yet there could be *no Jurisdiction* conferred on the Magistrates, in prejudice of these Heretable Sheriffships. And the Heretable Sheriffships having been so many; the *King* came *in the Right* of those which he had bought, whereby he might reduce a Posterior erection, *quoad* Jurisdiction, the *same way as the Sherriff* from whom he bought it, might have done: And the Heretable Sheriffs that stood still in Possession did concur, &c. whereby most of the Elections of Magistrats in the Kingdom were like to be swallowed up, and debauched.

It is true, to serve the *present turn*, and to *Varnish* over this hazard, there are many distinctions invented. Such as that there is a speciality in erection of Royal Burrows within heretable Sheriffships, in respect that they are a State of Parliament.

But its easily foreseen, that at *another time*, there would be a *difference* made betwixt a *State of Parliament*, and a *Particular* Burrow *in that State*. The same way as tho the *State* of Barrons must stand, yet that does not hinder the King to reduce the Rights of any *Particular* Barron.

The noise that is made against the *Highland* Regalities, is a meer shaddow without Substance For 1*mo*. The same Objections lye much stronger against Heretable *Highland* Sheriffs or other Judges: Because their *Bounds* being of *other Mens Lands*, are of *greater extent*: Whereby they are capacitate to do *more mischief*. Especially considering, 2*do*. That a *Highland* Lord of Regality is *aliunde*, *as Heretor or Chief*, bound to present his men by the special Acts of Parliament already made: Whereas a Sheriff may *collude securely*, not having that tye over his head.

There are several other mistakes advanced with great Art in this Matter: which are discovered by these undenyable grounds. Particularly,

1*mo*. The Heretable Sheriffships set up for a *Property* that cannot be diminished: whereas they are *expresly discharged by* the 44 *Act Parl.* 11. *Ja.* 2*d*.

However, this Act might be said to be *in desuetude*, in swa far as these Sheriffs have the General Vicegerency, and Government of the District, yet the *King* has *keeped up his Right* of erecting Regalities within them by perpetual *use*. So that *pro tanto* his Majesties prerogative is preserved; and consequently the *Nullity* of Heretable Sheriffships, in so far as they might pretend to exclude the effect of it does still stand *in Vertue* of that 44*th*. Act.

Neither is it sense to alledge, That the same Objection lyes against Regalities. Because, 1*mo*. by the 43 *Act*, immediatly preceeding the foresaid 44 *Act*, Regalities are *allowed*, *having deliverance of Parliament*: Which, according to the *Propriety of the Word*, and perpetual *Custom*, can only be understood of a *Ratification*: It never being heard, that a Regality was ever *originally* granted in Parliament. But 2*do*. *Esto* there were any Dubiety in the Case, there is a *subsequent Act* 72. Par. 14. *Ja*. II. ordaining the *Freedoms and Priviledges of Regalities to be keeped*. So that here Regalities are established by Law, *without any Exception*, whereas Heretable Sheriffships *stand condemned* by the foresaid 44. Act, which was *never repealed*; and *quoad* erecting of Regalities within them is not in Desuetude, as said is.

2*do*. There is no hazard from the Right of Repledgiation. Because, 1*mo*. where the Criminal both resides and hath committed the Delict within the Regality, it's congruous to the Custom of Nations, that the *Example* of Punishment should be published there. And there are Laws already made which bind *Chiefs* and *Landlords* as aforesaid. 2*do*. The Lord of Regality is not only *punishable* for delaying or perverting Justice: But must likeways *find Caution* for doing Justice before he can Repledge. 3*tio* By expres Law, the *Sheriff may proceed*, if the Lord of Regality do not *right*. 4*to*. Experience teaches, that heretable Sheriffs have committed greater Enormities than are known in any Regalities:

3*tio*. What Intercessions for such an Act, may have been *Mendicat*; serve only to demonstrat the *Danger* and *Concussion* that is to be feared from an Heretable Sheriff. For some Shires-Men spare not to say *privately*: *We would have had the perpetual Watch of the Sheriff and his Heirs at the Doors of our Tennents, tossing them frequently from their Labours, on pretence of Penal Statutes Discouraging them in all Defence and Pursutes wherein they should be concerned, at such a distance from Redress; besides the Expenses of obtaining thereof: Marking them out to guard Prisoners*, &c. *beyond other Neighbours of the Countrey*: And some worse things not fit to relate: *Whereby we would frequently have come to be affronted, and our Lands cast waste; if we had refused what was so anxiously required, while, in the mean time, others (who not bearing us Good-will, would be glad to get us in Disadvantage) did go in to the Plot.*

In respect whereof, no Act ought to be past, so Unjust in it self, and so Dangerous in the manner of presenting it.